

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
APPENDIX**

76-1496

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1496

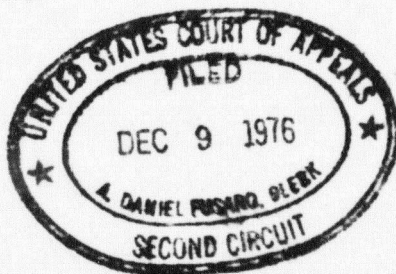
UNITED STATES OF AMERICA,
Appellant,

—v.—

RICHARD A. JACKSON, a/k/a "John Harris,"
Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

GOVERNMENT'S APPENDIX



ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States of America,
United States Courthouse Annex,
One St. Andrews Plaza,
New York, New York 10007.*

PAGINATION AS IN ORIGINAL COPY

INDEX TO APPENDIX

	PAGE
Relevant Docket Entries	A-1
Indictment 76 Cr. 247	A-4
Transcript of the Guilty Plea of Jackson on June 21, 1976	A-6
Transcript of the Sentencing of Jackson on July 22, 1976	A-19
Judgment of Conviction dated July 22, 1976	A-31
Government's Notice of Motion for an Order Pursu- ant to Rule 35, Fed. R. Crim. Po., and Accom- panying Affidavit and Exhibits	A-32
Memorandum and Order filed October 8, 1976 Deny- ing the Government's Motion	A-41
Government's Brief in <i>United States v. Cruz</i> , Dkt. No. 76-1337	A-51

CRIMINAL DOCKET - U.S. District Court

Y PETTY OFFENSE PD ☐ JUDGE ~~XXXXXXXX~~ Assigned U.S. ☐ vs. **JACKSON, RICHARD A. a/k/a "John Harris"**

OTHER MINOR OFFENSE MO ☐ **0852** Disposition **0208 1**

OTHER MISDEMEANOR MIS ☐ **0208 1** (LAST FIRST MIDDLE)

Case Filed Mo Day **03 12 76** No. of Days **02** Yr **76** Doc# No **0247** Dct **01**

U.S. MAG. CASE NO **76-286**

U.S. TITLE/SECTION OFFENSES CHARGED ORIGINAL COUNTS

18:2113(a) Bank robbery. 1

18:2113(b) Bank larceny. 2

SUPERSEDING COUNTS

U.S. MAG. CASE NO **76-286**

AMT ☐ Fugitive ☐ Par. Recog ☐ PSA ☐ Conditions ☐ 10% Deposit ☐ Surety Bond ☐ Collateral ☐ 3rd Party Cost ☐ Other ☐

\$5,000

Date ☐ Bail Not Made ☐ Status Changed (See Docket) ☐

II. KEY DATES & INTERVALS

ARREST or ☐ INDICTMENT ☒ ARRAIGNMENT ☐ TRIAL ☐

U.S. Custody Began **3-2-76** High Risk Date **3-12-76** Information **3-12-76**

Summons Served ☐ Indict Waived ☐ Superceding Indict/Info ☐

1st Appearance ☐ In Charging District ☐

1st Plea ☐ Trial Set For ☐ Trial Began ☐ Trial Ended ☐

Final Plea ☐ Trial Set For ☐ Trial Began ☐ Trial Ended ☐

NG ☐ G ☐ W ☐ NG ☐ G ☐ W ☐ NG ☐ G ☐ W ☐

SENTENCE

Disposition of Charges ☐ On All Charges ☐ On Lesser Offenses ☐ WOP ☐ WP ☐ On Governor's Motion ☐

MAGISTRATE

Search Warrant ☐ Issued ☐ Return ☐

Summons ☐ Issued ☐ Served ☐

Arrest Warrant Issued ☐

COMPLAINT ☐ DATE **03-03-76** INITIAL/NO **HRJ-080D**

OFFENSE (In Complaint)

INITIAL APPEARANCE DATE ☐ PRELIMINARY EXAMINATION ☐ REMOVAL OR HEARING ☐ WAIVED ☐ NOT WAIVED ☐ INTERVENING INDICTMENT ☐

DATE ☐ Scheduled ☐ Held ☐

Tape Number ☐

OUTCOME ☐ DISMISSED ☐ HELD FOR GJ OR OTHER PROCEEDING IN THIS DISTRICT ☐ HELD FOR GJ OR OTHER PROCEEDING IN DISTRICT BELOW ☐

U.S. Attorney or Asst **Peter M. Bloch, AUSA (212) 791-1986**

ATTORNEYS Defense ☐ CJA ☐ Ret. ☐ Waived ☐ Self ☐ None ☐ Other ☐ PD ☐ CD ☐

John Curley, LAS 374-1737

209 448

* Show last names and suffix numbers of other defendants on same indictment/information.

Moore-2,

DATE (DOCUMENT N.) PROCEEDINGS EXCLUDABLE DELAY (a) (b) (c) (d)

3-12-76 Filed indictment.

3-15-76 Deft. (Atty. present) pleads not guilty. Motion returnable in 10 days. Bail fixed by Mag. cont'd in the amount of \$5,000 cash or surety. Deft. cont'd remanded in lieu of bail. Case assigned to Briant, J. Griesa, J.

3-17-76 Filed the following papers rec'd from Magistrate Kaby (Mag. #76-286): Docket Entry, Criminal complaint-Disposition Sheet-Financial affidavit CJA 23-Order appointing counsel Federal Defender Services Unit Legal Aid society 15 Park Row N.Y.C. 10038 374-1737

5-4-76 Filed Deft's affdvt & Notice of Motion to suppress, pursuant to rule 41(f) of the F.R.CrP.

-OVER-

DEPOSITE THE APPLICABLE TICKET ENTRIES SHOW IN SECTION V ANY OCCURRENCE OF EXCLUDABLE DELAY PER 18 USC § 3161(h)

IV. PROCEEDINGS (continued)		PAGE TWO		V. EXCLUDABLE DELAY	
DATE	DESCRIPTION	Start Date (18)	End Date (19)	Ex. Code (20)	Ex. Days (21)
5-21-76	Filed govt's memorandum of law on admissability of deft's statements				
5-24-76	Filed Mag. Temp Commitment dated 3-3-76				
6-1-76	Filed Govt's notice of readiness for trial on or after 6-1-76				
05-05-76	Deft.(atty present) Deft. Jackson- R.O.R. pending surrender to N.Y. State drug program. Bench Warrant ordered to be lodg d as a detainer.....BRIEANT,J.				
06-03-76	Bench warrant issued.				
06-01-76	Filed Govt's affdvt. for a writ of habeas corpus directed to Warden of Queensboro Community Rehabilitation Center Writ issued				
6-3-76	Deft (atty present) Suppression hearing begun & concluded decision reserved. B/W vacated. R.O.R. on condition he follow all lawful directions of state narcotic program & pre-trial services of this court.....Brieant,J.		6-3-76;		
6-9-76	Filed letters from deft Jackson to Judge Brieant dated 5-13-76 & 5-28-76				
6-14-76	Filed Govt's memorandum in opposition to suppression of identification testimony				
6-3-76	Filed writ of habeas corpus Writ satisfied 6-3-76...Brieant,J.				
6-16-76	Filed Govt's affid Your deponent respectfully prays that a writ of H/C ad prosequendum issue,directing the Warden of Queensboro Community Rehabilitation Center & the U.S.Marshaj for the SDNY produce the Deft on June 21,1976 Writ return 6-21-76				
6-22-76	Filed Findings & conclusions & order # 44622 Motions by Jackson & Moore to suppress evidence & to bar any subsequent in-court identifications by the eye-witnesses are denied Jackson's motion to suppress the oral statement given by the FBI is denied Moore's motion to exclude evidence of prior convictions within the past ten years is denied. Moore's motion to exclude any reference to his admissions he had a \$250.00 a day drug habit & no regular source of income is granted...Brieant,J. M/N				
6-21-76	DEft(atty J. Cufley present) Produced on writ. Withdraws plea of not guilty & pleads guilty on ct 1.PSI ordered. Sent. adj to 7-20-76 Writ satisfied.....Brieant,J.				
6-24-76	Filed Govt's requests to charge				
6-29-76	Filed affid for W/H/C ad testificaddum writ issued 6-30-76				
7-1-76	DEft's request to charge				
7-1-76	Filed Govt's Suppl requests to charge				
7-6-76	Filed transcript of record of proceedings. dated 2-6-3-1976				

(Cont'd on Page #3)

FINE AND RESTITUTION PAYMENTS					
DATE	RECEIPT NUMBER	C.D. NUMBER	DATE	RECEIPT NUMBER	C.D. NUMBER

- A. Ex. ment. phy. safety U.S.C. 424
- B. NARA Exam. 28 U.S.C. 2952
- C. State or Federal trans. on other charges
- D. Introductory Apprais
- E. Hearings on pretrial systems
- F. Transfers from other districts per F.R.C.P. Rules 20, 21 & 40.
- G. Defendant motion is actually under advice. Period of up to 30 days is excludable per 18 USC 3161(h)(1)(G)
- H. Unnecessary proceedings. Probation or Federal recondition. Disposition. Extension
- I. Prosecution deferred by mutual agreement
- M. Unavailability of defendant or essential witness
- N. Period of mental or physical incompetence of defendant to stand trial
- O. Period of NARA Commitment or Treatment
- P. Superseding indictment and/or new charges
- R. Defendant awaiting trial of Co-defendant when no severance has been granted
- T. Continuance Granted per 3161(h)(1) i.e. ends of justice or complexity of case outweighs defendants interests
- U. Time between guilty plea and date with. Ours
- W. Grand Jury in. Ours per 3161(h)

DATE	PROCEEDINGS
7-12-76	Filed letter dated June 3, 1976 with Warrant for Arrest of Deft attached.... Bench Warrant lodged as a detainer vacated. Deft. R.O.R. on condition he follow all directions of State Drug program and pre-trial services of this Court... BRIEANT, J.
7-22-76	Filed Judgment & Commitment Order- The Deft. hereby committed to the custody of the Atty General for imprisonment for a period of ONE (1) YEAR on COUNT #1 as a YOUTHFUL OFFENDER pursuant to Section 5010(d) of Title 18, U.S. Code. COUNT #2 is DISMISSED on motion of Deft's counsel with the consent of the Government. Deft to surrender on 7-29-76 for service of sentence. Writ satisfied. Court recommends Deft receive treatment for his drug problem..... BRIEANT, J.
7-16-76	Filed affdvt for Writ of Habeas Corpus - Writ issued - Ret: 2-20-76.
7-14-76	Filed W/H/C Ad Pros - w/marshall's return. Writ satisfied 6-21-76... BRIEANT, J.
7-14-76	Filed W/H/C Ad Pros - w/marshall's return - Writ satisfied 7-1-76 ... BRIEANT, J.
8-11-76	Filed W/H/C Ad Pros - w/marshall's return - Writ satisfied 7-22-76 ... BRIEANT, J.
7-2-76	Filed transcript of record of proceedings, dated 6-21-76
9-29-76	Filed affdvt & Notice of Motion of Ira H. Block, AUSA, for an order, pursuant to Rule 35 of the F.R.Cr.P. correction the sentence previously imposed by the Court on 7-22-76 as being illegal, and for such further and additional relief as to the Court may seem just.
9-29-76	Filed Govt's Memorandum of Law in support of its motion for an order correcting the sentence imposed herein.
10-4-76	Filed Memorandum from Chris J. Stanton, Probation Officer to Judge Brieant dated 10-1-76.
10-8-76	Filed MEMORANDUM #45221- The Court holds that the sentence imposed on Jackson was a just and proper sentence, entirely within the statutory powers of this Court, and that he may become entitled to the benefits of the Youth Correction Act, including the Certificate expunging conviction. The motion is in all respects DENIED for want of merit. SO ORDERED..... BRIEANT, J. (m/n 10-12-76)
10-21-76	Filed Govt's Notice of Appeal to USCA from order denying USA motion, copymailed on 10-22-76 to: J. P. Curley-Fed Defender Serv. Unit 15 Park Row, NYC.
11-1-76	FLV certification to USCA on 11-1-76
11-04-76	Filed letter to J. MacMahon received 10-14-76 from deft.
11-19-76	Filed transcript of record of proceedings, dated 7-22-76

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BEST COPY AVAILABLE

UNITED STATES OF AMERICA,

- v -

RICHARD A. JACKSON, a/k/a "John
Harris" and PHILLIP MOORE,

Defendants.

INDICTMENT

76 Cr. 247 (CLB)

The Grand Jury charges:

On or about the 2nd day of March, 1976, in the Southern District of New York, RICHARD A. JACKSON, a/k/a "John Harris" and PHILLIP MOORE, the defendants, unlawfully, wilfully and knowingly, by force and violence and by intimidation, did take and attempt to take, from the person and presence of another, property and money in the approximate amount of \$1690, belonging to, and in the care, custody, control, management and possession of Union Dime Savings Bank, 1065 Avenue of the Americas, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(a) and 2.)

COUNT TWO

On or about the 2nd day of March, 1976, in the Southern District of New York, RICHARD A. JACKSON, a/k/a "John Harris" and PHILLIP MOORE, the defendants, unlawfully, wilfully and knowingly, and with intent to steal and purloin, did take and carry away property and money in the approximate

amount of \$1690 belonging to, and in the care, custody, control, management and possession of Union Dime Savings Bank, 1065 Avenue of the Americas, New York, New York, a bank the deposits of which were then insured by the Federal Deposit Insurance Corporation.

(Title 18, United States Code, Sections 2113(b) and 2.)

Foreman

ROBERT B. FINE, JR.
United States Attorney

BEST COPY AVAILABLE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

jg

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

----- x

UNITED STATES OF AMERICA :

vs. :

RICHARD JACKSON, :

Defendant :

----- x

76 Cr. 247 (CLB)

PLEA

Before:

Hon. Charles L. Brieant, Jr.,

District Judge

New York, N. Y.

June 21, 1976 - 12.45 P.M.

APPEARANCES:

Robert B. Fiske, Jr., Esq.,
United States Attorney
For the Government

By: Ira H. Block, Esq.,
Assistant United States Attorney

John Curley, Esq.,
Attorney for Defendant

Jackson

jg

MR. BLOCK: The Government is prepared to go forward, your Honor.

MR. CURLEY: Ready for the defendant.

THE COURT: Yes, Mr. Curley?

MR. CURLEY: Your Honor, Mr. Jackson telephoned me Friday and during our discussion he indicated that he had resolved some doubts and some misapprehensions concerning federal procedures and was interested in entering a plea of guilty.

We have received a transcript of the May 24th hearing before your Honor and a copy of Mr. Block's memorandum, and I have nothing to contradict Mr. Block's contentions. And if your Honor has not ruled on the motions made by defense counsel, I think --

THE COURT: I have ruled on them, Mr. Curley, but I don't believe my rulings have been filed. However, as far as your client's motion to preclude the allegedly suggestive implications in court, I am denying that motion and I am also denying a motion to suppress the confession.

MR. CURLEY: Mr. Jackson is named in two counts, the A and B counts in reference to the bank, as your Honor heard so much testimony on concerning the 24th. He is prepared to enter a plea of guilty to Count One, the A count, and I spoke to him earlier in one of the detention

1 jg Jackson

2 facilities in the courthouse concerning if he was aware of
3 what rights he would be giving up by entering a plea of
4 guilty rather than proceeding to trial and he told me he
5 was aware of those matters and was prepared to enter a
6 plea.

7 THE COURT: I'll have to ask him anyhow.

8 BY THE COURT:

9 Q What is your name?

10 A Richard Jackson.

11 Q How old are you, Mr. Jackson?

12 A Twenty one.

13 Q And you read, write, speak and understand English?

14 A Yes.

15 Q How far did you go in school?

16 A To the tenth grade.

17 Q You finished the tenth grade?

18 A Yes.

19 Q Where?

20 A At a junior high school, 275 in Brooklyn.

21 Q What is your occupation?

22 A At present, none.

23 Q Do you have a trade?

24 A Upholstery.

25 Q Are you married?

1 jg

Jackson

2 A No.

3 Q Are you currently or have you recently been under
4 the care of a physician or psychiatrist?

5 A Yes. I have been at the Rehabilitation Center.

6 Q For addicts?

7 A Yes.

8 Q For heroin?

9 A Right.

10 Q And you haven't had any heroin or any other narcotic
11 for a period of time, have you?

12 A No.

13 Q More than a couple of weeks?

14 A Yes.

15 Q All right. Are you feeling all right today?

16 A Yes.

17 Q Have you gone over Count One of this indictment
18 with Mr. Curley?

19 A Yes.

20 Q Has he explained to you what the charge is here
21 against you?

22 A Yes.

23 Q And do you fully understand it?

24 A Yes.

25 Q Have you told Mr. Curley everything you know about

1 jg

Jackson

2 this matter?

3 A Yes.

4 Q Would you like me to read Count One to you?

5 A It is all right. You can read it.

6 THE COURT: All right. Would you read Count One
7 and ascertain how Mr. Jackson wishes to plead.

8 (Count One read)

9 BY THE CLERK:

10 Q Do you understand that charge?

11 A Yes.

12 Q Do you now wish to withdraw your previously entered
13 plea of not guilty and to plead guilty to Count One?

14 A Yes.

15 Q Do you understand the nature of the charge against
16 you, that is, the charge under the first count, by having,
17 by intimidation, by a note, taken money from the teller of
18 the bank, money belonging to the bank, Union Dime Savings,
19 the deposits of which are insured by the Federal Deposit
20 Insurance Corporation? Do you understand that?

21 A Yes.

22 BY THE COURT:

23 Q Now, you are instructed that the maximum possible
24 penalty provided by law is that you may be fined the amount
25 of \$5,000 or sentenced to a term of twenty years or both

1 jg

Jackson

2 and in addition, in view of your age, you could be adjudged
3 a youthful offender, in which case the maximum period of
4 confinement and supervision would be six years? Do you
5 understand what the maximum sentences are?

6 A Yes.

7 Q Now, do you understand you have the right to be
8 represented by your attorney at every stage of the proceed-
9 ings and that, if necessary, an attorney will be appointed
10 to represent you?

11 A Yes.

12 Q Are you satisfied with Mr. Curley as your attorney?

13 A Yes.

14 Q Do you understand that you have the right to persist
15 in your plea of not guilty and that you have the right to
16 have a speedy and public trial by a jury of twelve people,
17 which I would start with you as soon as I have finished the
18 case I have here now, and at that trial you have the right
19 to assistance of counsel, the right to confront and cross
20 examine witnesses against you, and at such trial you cannot
21 be compelled to incriminate yourself or to testify unless
22 you wish to do so? Do you understand all that?

23 A Yes.

24 Q Do you understand further that if your plea of
25 guilty is accepted there will not be a further trial of any

jg

Jackson

kind as to you, so that by pleading guilty you waive your right to a trial, giving it up?

Do you know what "waive" means?

A Yes.

Q Do you understand that if you plead guilty, the Court may ask you questions about the offense to which you have pleaded?

A Yes.

Q Have you been induced to offer to plead guilty by reason of any promises, statements or predictions by anyone to the effect that you would get leniency or special treatment or special consideration if you pleaded guilty instead of going to trial?

A No.

Q Have you been induced to plead guilty by reason of any fear or pressure or force or anything like that?

A No.

Q Do I understand you are offering to plead guilty because you believe that you are guilty and the Government is likely to be able to prove it?

A Yes.

Q Are you presently under the influence of any substance such as alcohol or drugs or the like that might affect your ability to understand what you are doing now?

1 jg

Jackson

2 A No.

3 THE COURT: I heard the suppression motion, Mr.
4 Block. But will you represent for the record that you have
5 sufficient evidence to make a prima facie case?

6 MR. BLOCK: Your Honor, the Government does so
7 represent even separate and apart from the matter sought
8 to be suppressed.

9 THE COURT: Mr. Curley, do you know any valid legal
10 defense available to Mr. Jackson or do you know any reason
11 why he should not be permitted to plead guilty?

12 MR. CURLEY: No, your Honor. As indicated, we've
13 had extensive pretrial matters in this case in addition to
14 my own investigation and conversations with Mr. Jackson.

15 MR. BLOCK: Your Honor, there is one small matter.
16 There is a theoretical possibility. Mr. Jackson is currently
17 in state state custody and I understand the detainer from
18 the state has accompanied him pursuant to the writing pro-
19 ducing him in court today.

20 It is possible that your Honor might impose a
21 prison sentence that might be consecutive to whatever time
22 he owes to the State of New York.

23 THE COURT: It is more than possible. He also
24 might be judged a young adult offender.

25 Q I am making no sentence prediction to you, Mr.

1 jg Jackson

2 Jackson. You understand that.

3 A I understand that.

4 Q Whatever the sentence will be depends on how you
5 shape up with the Probation officer, who is going to inter-
6 view you.

7 A Right. I understand that.

8 Q All right.

9 A I understand that.

10 MR. BLOCK: The idea was that it might be con-
11 secutive.

12 THE COURT: Certainly.

13 Q You understand what he means, don't you?

14 A I understand that.

15 Q All right. Now, is your plea voluntary?

16 A Yes.

17 Q Do you understand that by your plea you are giving
18 up your right to take any appeal from my denial of the motion
19 to suppress the confession?

20 A Yes, sir, I understand.

21 Q All right. Does your willingness to plead guilty
22 result from any prior discussions had between the attorney
23 for the Government and yourself or your attorney?

24 A No.

25 THE COURT: I accept that. And you will move to

1 jg Jackson

2 dismiss Count Two on the day of sentence, is that right,
3 Mr. Curley?

4 MR. CURLEY: Yes.

5 THE COURT: Anything else, Mr. Curley, that has
6 been understood between yourself and the Government?

7 MR. CURLEY: No understanding.

8 THE COURT: Or you, Mr. Jackson?

9 THE DEFENDANT: Not exactly. It wasn't
10 exactly -- Mr. Curley didn't make it -- he didn't make the
11 standard, but I had asked him, by my pleading guilty, would
12 that affect the fact that you had had the detainer vacated
13 and I was eligible for passes over at the Rehabilitation
14 Center.

15 I asked him if I pleaded would that affect that,
16 and he told me -- he didn't say precisely, but he more or
17 less said he didn't see why it should.

18 THE COURT: You are not pleading because of any
19 reliance on anything like that, are you?

20 THE DEFENDANT: No.

21 THE COURT: I think probably, until you are sen-
22 tenced, there won't be any change in your status, but I can't
23 guarantee that. Do you understand?

24 THE DEFENDANT: Right.

25 THE COURT: All right. Did you do what the tellers

1 jg

Jackson

2 testified the other day here? Did you come in with a note
3 and give the tellers the note?

4 THE DEFENDANT: Yes.

5 THE COURT: And you walked out the bank with it?

6 THE DEFENDANT: Right.

7 THE COURT: Like she said?

8 THE DEFENDANT: Just like she said.

9 THE COURT: And you knew that was wrong.

10 THE DEFENDANT: Yes.

11 THE COURT: All right. I'll accept your plea
12 and I'll direct that a complete presentence report be made
13 and I'll establish a date for your sentence at this time.

14 July 20th at 9.30. And I'll continue you in
15 your present bail status. But, regardless of what they
16 let you do over there, you have to be here.

17 THE DEFENDANT I know. I understand that. I
18 understand that.

19 THE COURT: I want to make it very clear to you
20 that failure to do that might be a separate crime.

21 THE DEFENDANT: I know.

22 MR. BLOCK: We would also ask you personally to
23 instruct the defendant concerning the additional conditions
24 of his release, if the furlough was longer than 24 hours, he
25 is to report to the Pretrial Services Agency.

1 jg

Jackson

2 THE DEFENDANT: I understood that with my counsel
3 over there at the Center.

4 THE COURT: And you have been in compliance?

5 THE DEFENDANT: Yes.

6 THE COURT: Will you continue to do exactly what
7 you were doing before today?

8 THE DEFENDANT: Yes.

9 THE COURT: And it will be the right thing to do.
10 All right.

11 That's all.

12 MR. BLOCK: I think the writ ought to be satis-
13 fied.

14 THE COURT: I don't want to change his status, if
15 he is happy with what he is doing over there, getting out on
16 furlough. I don't want to change his status, if I can
17 avoid it.

18 MR. BLOCK: If this writ is not satisfied, he
19 will remain in federal custody at the Metropolitan Correc-
20 tional Center.

21 THE COURT: I thought you were in the program.

22 THE DEFENDANT: I was. But when I came here
23 today, the Marshal just processed me into MCC.

24 THE COURT: All right. You want me to satisfy
25 the writ, Mr. Curley?

1 jg Jackson

2 MR. CURLEY: Yes.

3 THE COURT: I can't control these things. What-
4 ever happens to you is what is going happen. Do you under-
5 tand that? I'll do the best I can to get you back in the
6 program.

7 MR. BLOCK: He isn't in the program. This is
8 just a technical matter.

9 THE COURT: I am satisfying the writ, Mr. Block.
10 I don't disagree with you. I just don't want Mr. Jackson
11 to blame me if it doesn't turn out.

12 Okay.

13 - - -

14

15

16

17

18

19

20

21

22

23

24

25

1 mbr

2 UNITED STATES DISTRICT COURT

3 SOUTHERN DISTRICT OF NEW YORK

4 ----- x

5 UNITED STATES OF AMERICA, :

6 v. :

76 Cr. 247

7 RICHARD JACKSON, :

8 Defendant. :

9 ----- x

10 Before:

11 HON. CHARLES L. BRIEANT,

12 District Judge

13 New York, July 22, 1976
14 Room 905 - 9:30 a.m.

15 APPEARANCES

16 ROBERT B. FISKE, JR., Esq.,
17 United States Attorney for the
18 Southern District of New York
19 By: IRA BLOCK, Esq.,
20 Assistant United States Attorney

21 JOHN CURLEY, Esq.,
22 Attorney for Defendant

23 -o0o-

A 20

2

1 rmb

2 THE CLERK: United States of America v.
3 Richard Jackson for sentence.

4 MR. BLOCK: The government is ready, your Honor.

5 MR. CURLEY: The defendant is ready.

6 THE COURT: Is there any reason why sentence
7 should not be imposed at this time?

8 MR. CURLEY: No, your Honor.

9 THE COURT: Mr. Jackson, is there any reason
10 why sentence should not be imposed at this time?

11 MR. JACKSON: No, sir.

12 THE COURT: You may be heard on your client's
13 behalf, Mr. Curley and present any information in miti-
14 gation of sentence.

15 MR. CURLEY: Mr. Jackson pled guilty to the
16 first count of this indictment and your Honor will recall
17 the facts. There was a full hearing, at which time
18 the strength of the government's case was revealed and
19 the role that he played, how he and his co-defendant were
20 apprehended immediately thereafter and the number of blunders
21 they made in attempting to commit this crime, and shortly
22 thereafter Mr. Jackson advised me he had been under the
23 misapprehension that the Court would not accept a plea from
24 one of two defendants --

25 THE COURT: He said he got that from you,

1 rmb

2 Mr. Curley.

3 MR. CURLEY: I hope he did not, but he may
4 have.

5 THE COURT: You have to talk very clearly to some
6 of your clients who don't have the education you have had.

7 MR. CURLEY: I will say there was a problem as
8 to what would happen if he did plead guilty because it was
9 undetermined whether he would be called as a witness by the
10 government or co-defendant and what position he could take
11 at that time.

12 THE COURT: As I remember, Mr. Jackson was willing
13 to cooperate and testify.

14 MR. CURLEY: That is correct, your Honor.
15 I think shortly thereafter these proceedings took place
16 and the co-defendant, informed of that fact, was partially
17 persuaded to enter a plea of guilty.

18 We are aware Mr. Jackson has a drug problem
19 that he is trying to overcome with the accompanying
20 commitment to the drug facility in Queens and that he
21 has a prior criminal record.

22 The defendant I think has had a very different
23 outlook concerning this case, the case being prosecuted in
24 the federal court, and I think his prior convictions and
25 arrests have been in the state court exclusively where

1 rmb

2 he has been the subject of dispositions that have not
3 necessarily made any impression upon him. This prosecu-
4 tion, with the attention that has been given to him and to his
5 case I think is just the opposite. In addition, I am
6 pleased to note in the probation report that the counselors
7 with whom he has been working in the Queens facility have
8 indicated that he has made quite a satisfactory adjustment
9 at that institution.

10 While this case has been pending Mr. Jackson has
11 been at the Metropolitan Correction Center, has been at
12 that facility, back and forth on writs, and at times has
13 had a very harried existence.

14 THE COURT: I did all I could to try to work out
15 his problem.

16 MR. CURLEY: I am aware of that, your Honor.
17 He was in court several times seeking the Court's assistance
18 and he was advised on other occasions what had taken place
19 in his absence.

20 The report also confirms that on several
21 occasions he was granted privileges which allowed him
22 to leave that facility, an opportunity to spend some time
23 with his family based primarily upon his promise to return,
24 and he did so.

25 The report indicates that he is trying to start

1 rmbhr

2 some home life and he has hopes for getting employment
3 either through his uncle's upholstery business or in some
4 other area.

5 Based upon these factors, your Honor, it would
6 seem appropriate to see if Mr. Jackson could work with the
7 drug counselors and the probation officers and continue
8 to overcome the problems previously associated with drug
9 addiction which were the prime movers in this particular
10 case and many of the more recent cases that appear in his
11 background.

12 Mr. Jackson himself has been quite candid in
13 discussing this case with various public officials, like
14 Mr. Stanton, of the Probation Department, seems to have a
15 good insight into the seriousness of his conduct in this
16 case and expresses a sincere desire to get away from the
17 problems of being a defendant in the criminal courts from
18 this point on.

19 THE COURT: How long does he have to run on
20 his Queens detention.

21 MR. BLOCK: Your Honor, if I may be of assistance
22 to the Court, I think that Mr. Jackson's acceptance at
23 Queensborough was an accommodation to the Court and to the
24 United States Attorney's office, at least as of the
25 time he was originally committed. I don't believe they are

1 rnbr

2 desirous of continuing him in the facility, although I would
3 say my information is maybe two or three weeks stale.

4 I spoke to the associate director there. If Mr. Curley has
5 any contrary information --

6 THE COURT: The Probation Department doesn't
7 really tell us what his required length of stay is.

8 What do you say, Mr. Curley? It may not
9 be too important but the Court would like to know.

10 MR. CURLEY: I did speak with a woman who was
11 a representative of that organization several months ago and
12 I think she told me at that time that it was over a year
13 but they would not make any decision while he had a pending
14 case. I think, as Mr. Block commented, that they feel in
15 light of his federal case their continued supervision is
16 inappropriate and if he is placed on probation they will close
17 out their case, if he is sent to prison by your Honor,
18 they will close out their case. My conversation is with
19 them --

20 THE COURT: The inference is they won't permit
21 him to serve concurrently there and --

22 MR. BLOCK: Your Honor, it is a question of
23 resources. If he is going to be under the supervision
24 of the probation office here --

25 THE COURT: It may not be practical?

1 rmbrr

2 MR. BLOCK: That is correct.

3 THE COURT: What do you have to say, Mr.
4 Jackson, in your own behalf or in mitigation of sentence?

5 MR. JACKSON: All I would like to say is that
6 since I have been in the program, like my outlook on life
7 itself has changed, you know, a whole lot, and I would like
8 another chance.

9 THE COURT: Does the government have any comments?

10 MR. BLOCK: Your Honor, I would say, to put
11 this whole matter in perspective, that Mr. Jackson when he
12 determined that it was in his interests and that the govern-
13 ment was interested in having his cooperation was quite
14 cooperative. As your Honor knows, that came sort of as
15 the trial was beginning and I was not even able to speak with
16 Mr. Jackson about what his testimony would be until after
17 the first day of trial had concluded, but I believe at that
18 time he was extremely candid and gave a full recitation
19 of the events and I think that his decision to cooperate
20 was extremely instrumental in the course that the trial
21 thereafter took and if it had not taken that course, I
22 believe that Mr. Jackson's testimony would have contributed
23 quite heavily to the strength of the government's case.

24 THE COURT: Mr. Jackson, your sentence pre-
25 sents a difficulty for the Court. I will start off with

1 rmbrr

2 mentioning to you the recommendation of the United States
3 Probation Officer, which is that you be sentenced to a
4 period of incarceration under Title 18, United States Code,
5 Section 5010(b). That is a federal provision for youth-
6 ful offenders and I am inclined to agree that you are a
7 proper case for treatment as a youthful offender. I find
8 that your date of birth is August 22, 1954 and that you
9 would benefit from such treatment and that it is not
10 appropriate, under your circumstances, to take you as
11 a probation case. However, the suggestion of the
12 probation officer presents the Court with another problem,
13 which your attorney will understand and probably explain
14 to you better than I can, if you go in under that type of
15 sentence that they recommend, for reasons which escape me,
16 they place you under the guidelines and under those guide-
17 lines you can serve 36 to 45 months and I believe that is
18 too long. The Court would sentence you as a youthful
19 offender under Section 5010(b) of Title 18 except that
20 the Court believes that the effect of the guidelines in
21 your case would be improper and to protect your situation
22 from what I think is really inappropriate, that is, the use
23 of guidelines which are primarily slanted or affected
24 by the nature of the crime in cases where treatment is in-
25 dicated, the Court will sentence you as a youthful offender

1 rmb

2 and it is adjudged you are a youthful offender and you are
3 sentenced under Section 5010(d) of Title 18 of the United
4 States Code to a term of one year and the Court will recom-
5 mend that you be sent to the Robert F. Kennedy Youth Center
6 and will also recommend that you receive further narcotics
7 counselling. The rest of it is up to you. You will be
8 entitled to earn your good time and entitled to any credit
9 for prior federal detention that you have, and that is the
10 sentence imposed on Count 1. Is there a motion to dismiss
11 Count 2?

12 MR. CURLEY: The defendant so moves, your
13 Honor.

14 MR. BLOCK: The government consents, your Honor.
15 I have had some difficulty in other cases and your deputy
16 clerk tells me your Honor has difficulty with the Bureau
17 of Prisons only --

18 THE COURT: Everybody has difficulty with
19 them.

20 MR. BLOCK: They take the view that under
21 Section D the term of imprisonment imposed thereunder is not
22 one under the Federal Youth Corrections Act.

23 THE COURT: I disagree with them. I have
24 written an opinion to that effect.

25 MR. BLOCK: I would suggest your Honor refer to

A 28

10

1 rmb

2 that or make an insertion.

3 THE COURT: That is United States v. Commack.
4 But I will sign your certificate for you if you come out
5 with a decent record. Do you understand that?

6 THE DEFENDANT: Yes, sir.

7 THE COURT: So it is up to you.

8 THE DEFENDANT: Your Honor, I would like to
9 make it known when I was brought over here from the facility
10 by the marshal none of my belongings were brought with me,
11 my mail, clothes, jewelry, nothing.

12 THE COURT: Is there any practical suggestion?
13 The man has been decent with us and we ought to try to
14 cooperate with him. What is it you want to do?

15 THE DEFENDANT: If it wasn't impossible for me
16 to do, I would like to have time to go to the facility,
17 get my belongings and surrender myself.

18 THE COURT: When do you want to surrender?

19 THE DEFENDANT: A week, if possible.

20 THE COURT: It has to be on a Thursday,
21 Mr. Jackson. 10:30 on Thursday in Room 506 of this court-
22 house. You are to be there. I will have to set which
23 Thursday for you. I will satisfy the writ and I will send
24 you back to Queensborough. You want to come this
25 Thursday or a week from Thursday?

1 rmb

2 THE DEFENDANT: A week from Thursday.

3 MR. BLOCK: That is two weeks from today.
4 your Honor. Today is Thursday.

5 THE COURT: We have a procedural problem here.
6 The problem is whether the people at Queensborough will
7 you out.

8 THE DEFENDANT: I am scheduled to be released
9 from there tomorrow. I went before the review board
10 day --

11 THE COURT: Why won't you surrender this
12 Thursday, a week from today? Will you do that?

13 THE DEFENDANT: Yes.

14 THE COURT: That is July 29th. Let's get
15 this straight. As I understand it, you are promising
16 you will be there, right?

17 MR. JACKSON: Yes.

18 THE COURT: But please understand that you are
19 placed on your own recognizance, paroled in your own name
20 by the Court from the time you leave Queensborough until
21 next Thursday at 10:30 in the morning in Room 506.

22 THE DEFENDANT: Yes, sir.

23 THE COURT: If you fail to show up there the
24 Court will regard that as an entirely separate crime of
25 jumping and if you get convicted of bail jumping that

1 rmb

2 federal felony and you can do five years on that.

3 Are we going to have any trouble over that?

4 THE DEFENDANT: No.

5 THE COURT: I will satisfy the writ and you
6 be there Thursday. If you have a problem you telephone
7 either Mr. Block or Mr. Curley, but let's not have a
8 problem.

9 All right, so ordered.

10 - - -

United States of America vs.

A 31

United States District Court for

DEFENDANT **Richard A. Jackson a/k/a** **Southern District of New York**

John Harris DOCKET NO. **76 Cr. 247 CLB**

JUDGMENT AND PROBATION/COMMITMENT ORDER

AO 245 (2/74)

In the presence of the attorney for the government
the defendant appeared in person on this date MONTH 7 DAY 22 YEAR '76

COUNSEL ☐ WITHOUT COUNSEL However, the court advised defendant of right to counsel and asked whether defendant desired to have counsel appointed by the court and the defendant thereupon waived assistance of counsel.

☒ WITH COUNSEL **John Curley**

Defendant produced in Court on a Writ of Habeas Corpus Ad Prosequendum.

PLEA ☒ GUILTY, and the court being satisfied that ☐ NOLO CONTENDERE, ☐ NOT GUILTY
there is a factual basis for the plea.

There being a finding/verdict of ☐ NOT GUILTY Defendant is discharged.
☒ GUILTY.

FINDING & JUDGMENT Defendant has been convicted as charged of the offense(s) of **bank robbery (Title 18, U.S. Code, Sections 2113(a) and 2.)**

SENTENCE OR PROBATION ORDER The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of **/ on count 1**
ONE (1) YEAR as a YOUTHFUL OFFENDER pursuant to Section 5010(d) of Title 18, U.S. Code.

Count 2 is dismissed on motion of defendant's counsel with consent of the Government.
Defendant to surrender on July 29, 1976 for service of sentence.

Writ satisfied.

SPECIAL CONDITIONS OF PROBATION Court recommends defendant receive treatment for his drug problem.

ADDITIONAL CONDITIONS OF PROBATION In addition to the special conditions of probation imposed above, it is hereby ordered that the general conditions of probation set out on the reverse side of this judgment be imposed. The Court may change the conditions of probation, reduce or extend the period of probation, and at any time during the probation period or within a maximum probation period of five years permitted by law, may issue a warrant and revoke probation for a violation occurring during the probation period.

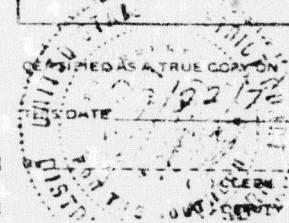
COMMITMENT RECOMMENDATION The court orders commitment to the custody of the Attorney General and recommends:
Robert F. Kennedy Youth Center.

SIGNED BY ☒ U.S. District Judge
☐ U.S. Magistrate

Charles L. Bricant

Date 7-22-76

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the U.S. Marshal or other qualified officer.



BEST COPY AVAILABLE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

BEST COPY AVAILABLE

UNITED STATES OF AMERICA,

- v -

RICHARD JACKSON,

Defendant.

NOTICE OF MOTION

76 Cr. 247 (CLB)

S I R :

PLEASE TAKE NOTICE that upon the annexed affidavit of Ira H. Block, Assistant United States Attorney, sworn to September 17, 1976, and upon all the proceedings heretofore had herein, the United States of America hereby moves this Court for an order, pursuant to Rule 35 of the Federal Rules of Criminal Procedure, correcting the sentence previously imposed by the Court on the defendant herein on July 22, 1976 as being illegal, and for such further and additional relief as to the Court may seem just.

Dated: September , 1976.

Yours, etc.,

ROBERT B. FISKE, JR.
United States Attorney for the
Southern District of New York
Attorney for the United States of
America

By: *S*

IRA H. BLOCK
Assistant United States Attorney
United States Courthouse Annex
On St. Andrews Place
New York, New York 10007

TO: John P. Curley, Esq.
Federal Defender Services Unit
15 Park Row
New York, New York 10038

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

- v -

RICHARD JACKSON,

Defendant.

AFFIDAVIT

76 Cr. 247 (CLB)

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.
SOUTHERN DISTRICT OF NEW YORK)

IRA H. BLOCK, being duly sworn, deposes and says:

1. I am the Assistant United States Attorney in charge of the above captioned proceeding and represented the Government during the proceedings of July 22, 1976 when defendant Jackson was sentenced by this Court to a one year term of imprisonment as a youth offender pursuant to Title 18, United States Code, Section 5010(d).

2. As the transcript of the sentencing proceeding (a copy of which is annexed hereto as Exhibit A) indicates, after the Court announced its sentence, I expressed concern that a sentence under subdivision (d) of section 5010 was, as a matter of law, not a sentence pursuant to the Youth Corrections Act and that, consequently, the Court's objectives in finding that defendant Jackson was "a proper case for treatment as a youthful offender" and that he "would benefit from such treatment" might not be achieved by the sentence imposed.

3. As explained in the accompanying memorandum of law, the Government respectfully submits that in its present form the Youth Corrections Act (18 U.S.C. §§5005-5026) does not empower a court to impose a sentence thereunder of a fixed term of less than six years such as has been done in this case.

4. Because the Bureau of Prisons shares the view that a less than six years determinate sentence is not authorized in the Youth Corrections Act, failure by this Court to correct the sentence imposed on July 22, 1976 will result in Jackson failing to receive any statutory or extra good time credit pursuant 18 U.S.C. §§4161 and 4162. (See Bureau of Prisons Policy Statement 7600.58 dated October 9, 1973, a copy of which is annexed hereto as Exhibit B). Likewise, inasmuch as the Parole Commission interprets the Youth Corrections Act as requiring a minimum of two years of supervision on parole once the period of confinement of a committed youth offender has been completed and early termination of such parole on the basis of merit as a prerequisite to issuance of a certificate under 18 U.S.C. §5021, unless the Court corrects its previously announced unsanctioned sentence, a significant benefit of sentence under the Youth Corrections Act which the Court no doubt intended to confer upon Mr. Jackson will be unavailable. (See letter from General Counsel, United States Parole Commission, to Assistant United States Attorney Devorkin, dated June 28, 1976, a copy of which is annexed hereto as Exhibit C.)

5. In the Government's opinion, the illegality of the sentence imposed in this case may be corrected either by (i) omitting any stipulation that the custodial commitment of Jackson is one made pursuant to the Youth Corrections Act or (ii) converting the custodial commitment of one year under subdivision (a) of Section 5010 to an indeterminate sentence under subdivision (b) of said section.

WHEREFORE, it is respectfully requested that the sentence previously imposed herein be declared null and void and that the defendant be resentenced in accordance with law.

IRA E. BLOCK
Assistant United States Attorney

Sworn to before me this
17th day of September, 1976.

ALLEN R. BENTLEY
Notary Public State of New York
No. 24 0248620
Qualified in Kings County
Commission Expires March 30, 1977

BEST COPY AVAILABLE

EXHIBIT A TO THE AFFIDAVIT, THE TRANSCRIPT
OF PROCEEDINGS ON JULY 22, 1976, IS REPRODUCED,
SUPRA.

711.58

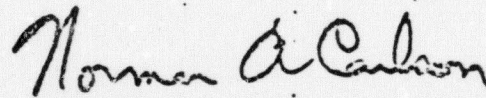
10-9-73

SUBJECT: PROCEDURES FOR COMMITMENTS TO A TERM OF LESS THAN SIX YEARS UNDER THE PROVISIONS OF THE YOUTH CORRECTIONS ACT

1. BACKGROUND. While it has long been established that commitments to the custody of the Attorney General under the Youth Corrections Act must be under the provisions of 18 USC 5010(b) or (c), and that these commitments must be for a term of 6 years (under 5010(b) and 5017(c), or for a term in excess of 6 years (under 5010(c) and 5017(d), a number of courts have insisted on committing youths to a term of years of less than 6 years under the provisions of the Act.
2. POLICY. Since such commitments are not authorized by the statute, it is the policy of the Bureau of Prisons to call all such situations to the attention of the sentencing court.
- ✓ 3. PROCEDURES. The following procedures should be followed when a commitment of less than 6 years under the YCA is received:
 - a. The Records Officer will prepare, for the Chief Executive Officer's signature, a letter to the United States Attorney for the sentencing district. He will follow the guidelines shown in the appendix, explaining the position of the Bureau, and suggesting possible remedies. Copies of the letter will be forwarded to the Office of General Counsel and Review, through the Central Office Records Administrator, and to the Legal Counsel, U. S. Board of Parole.
 - b. If, after a reasonable period of time and one routine 30 day follow up, no response is received, or, if the sentencing court declines to take remedial action, compute the term as follows:
 - ✓ (1) If the term specified by the court is less than four years, compute the sentence without a mandatory parole date. The full term date should be modified for jail credit and inoperative time, and the resulting date will be the unconditional release date (EXP-FI).
 - (2) If the term specified by the court is more than four years but is less than six years, establish a mandatory parole date at four years from the date of conviction (adjusted for jail credit and inoperative time). The full term date (unconditional release date) will be at the term specified by the court (adjusted for jail credit and inoperative time).
 - c. Immediately after the computation is done, a package, consisting of a copy of the 12-6, a copy of any negative response by the court, or in the absence of a court response, a full copy of the letter up, report, will be sent to the Central Office Records Administrator. A similar package will be sent to the Legal Counsel, U. S. Board of Parole.

- 2 -

- d. Statutory and extra good time (18 USC 4161 and 4162) will not be applicable to these commitments as release procedures for youth commitments are governed by 18 USC 5017, rather than by 18 USC 4163.
- e. Parole docketing will follow the procedures established for regular YCA commitments.



NORMAN A. CARLSON
Director

United States Department of Justice

A 39

United States Parole Commission

Washington, D.C. 20537

June 28, 1976

Mr. Michael S. Devorkin
Assistant U.S. Attorney
One St. Andrews Plaza
New York, New York 10007

Dear Mr. Devorkin:

This is in response to your letter of June 7, 1976, requesting the Commission's position with regard to sentences providing for less than six years confinement which are stated to be pursuant to the Youth Corrections Act. Such sentences pose a number of problems in their effect on the administration of parole.

Taking first the category of sentences which consist of a term of years only (less than the six year term required by 18 U.S.C. § 5010(b)), the net result of such a sentence may well be to defeat the statutory goal of providing a minimum of two years of supervision on parole once the period of confinement is served, 18 U.S.C. § 5017(c), as well as to reduce the chances of early termination of parole supervision on the basis of merit, which the Commission considers to be a prerequisite to issuance of a certificate under 18 U.S.C. § 5021. We should also note that 18 U.S.C. § 5017(b) requires a minimum of one year of supervision before the parolee can be discharged, which further reduces the possibility of a § 5021 certificate in the case of a short sentence.

While the Commission applies its Youth Act guidelines, at 28 C.F.R. § 2.20, ^{1/} to such cases regardless of length of sentence, the prisoner whose guideline range encompasses the total length of his sentence may serve to the full expiration date of his sentence, since the Bureau of Prisons does not apply the good time release statutes (18 U.S.C. §§ 4163/4) to any of the Youth Act sentences. ^{2/}

^{1/} These guidelines provide for shorter suggested ranges of time to be served before release than do the adult guidelines, in almost all cases.

^{2/} In the case of sentences of over four years, the Bureau of Prisons releases the prisoner on mandatory parole as required by 18 U.S.C. § 5017(c).

EXHIBIT C



In addition, the two-thirds release provision of the new 18 U.S.C. § 4206(d) will not apply in most of these cases, since that section applies only to sentences of five years or more.

However, the Commission does consider such prisoners immediately eligible for parole, thus ensuring that in some cases a particular configuration of type of offense, personal background (salient factor score) and sentence length will result in a parole grant and a period of adequate supervision. However, since the time when a particular prisoner is suitable for parole release cannot be precisely determined until a parole hearing has been held (a hearing must be held before 120 days from the start of commitment), the tailoring of individual sentences of this nature to ensure an adequate period of supervision is not a task which can be accomplished with any degree of certainty at the sentencing stage.

In addition we would point out that if parole in a Youth Act case must be revoked, the period of supervision cannot be extended in the case of a willful evader of supervision or of a parolee convicted of a new crime, as can be done with most adult sentences under 18 U.S.C. § 4210(b)(2) and (c). Thus, a shorter period of supervision than the required two years may be of minimum benefit as a protection for the community.

In the case of a split sentence under 18 U.S.C. § 3651, the Commission simply does not consider such prisoners for parole during the term of confinement, in accordance with the presumed intent of the sentencing court that the set period of time be served. Since probation commences upon release, the Commission longer has jurisdiction at that point.

In conclusion, our doubts as to the legality of such sentences are based primarily on the obvious statutory purpose to provide adequate time under supervision for the successful return of the prisoner to the community, (following an appropriate period of confinement) which may be frustrated or thwarted entirely depending on the circumstances of the case and the length of sentence imposed.

I hope this letter will be of assistance to you, and we will be glad to answer any further questions you may have. In addition we are referring a copy of this letter to the Bureau of Prisons for their comment.

Sincerely,

Joseph A. Barry
General Counsel
Michael O. Stover
Michael Stover, Attorney

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

A 41

UNITED STATES OF AMERICA,

-y-

E. D. JACKSON.

Defendant.

76 Cr. 247-CLB

MEMORANDUM AND ORDER

BEST COPY AVAILABLE

: cont. J.

On July 22, 1976, on his plea of guilty defendant Richard Jackson was convicted of having robbed a branch of the federally insured Union Dime Savings Bank at 1065 Avenue of the Americas in Manhattan on March 2, 1976. Egged on, no doubt, by his defendant Moore, who acted as look-out, he handed a semi-literate teller a compliant teller, fled the bank with its money, and was taken in hot pursuit.

Mr. Jackson was born August 22, 1954, and was under twenty-two (22) years of age at the time of his crime. He was sentenced, pursuant to 18 U.S.C. §5010(d), to not more than one year of incarceration as a youthful offender.

By motion filed September 29, 1976, the Government now seeks an order, pursuant to Rule 35, F.R.Crim.P. "correcting the sentence previously imposed ... as being illegal." Simply stated,

the position of the Government here is that determinate sentencing is not authorized under the Federal Youth Corrections Act. This Court may vacate an illegal sentence at any time, and may impose a more onerous, lawful sentence. If illegal, a sentence is a nullity.

In its memorandum submitted in support of this motion, the Government concedes (p. 12), that a sentence of probation under 18 U.S.C. §5010(a) would be lawful, but "inappropriate in view of the serious offense of which he stands convicted." With this statement, so far as it goes, the Court agrees.

Mr. Jackson was raised by his maternal grandmother in the depressed, inner city "Brownsville" area of Brooklyn and is a young man of limited education. By the time of sentence, he had partially conquered his problem of narcotics with the aid of the Queensboro Rehabilitation Center of the State of New York, where he had been lodged prior to trial. He had a record of minor criminality and social maladjustment, beginning with his commitment at the age of thirteen as a "Person in Need of Supervision."

Insofar as his federal crime is concerned, he expressed contrition not only by his plea of guilty, but also by an offer to cooperate and testify against his codefendant, who pled guilty after selection of a jury, when his counsel learned that Jackson's testimony would be available to the Government.

At the time of sentence, the United States Probation Officer had recommended to the Court that an indeterminate sentence, up to six years, be imposed on Jackson as a Youth Offender under 18 U.S.C. §5010(b). The Probation Officer had informed the Court that if the recommendation were followed, such a commitment would suggest that "in the absence of reasons to the contrary, the defendant will probably be paroled during the guideline period", which the probation officer estimated as ranging from 36 months to 45 months.

We will refrain from any attempt to add to the learning concerning Parole Release Guidelines, except to observe that the severity of the crime is a substantial factor in determining the length of confinement thereunder. Where the purpose of a sentence is rehabilitation and treatment of an individual, how can use of standardized stereotyped "guidelines" be appropriate?

In view of his youth, his contrition, his successful efforts towards overcoming his drug habit, and his disadvantaged childhood, and the Court's belief that Jackson is capable of being rehabilitated and saved, his case cries out for a form of sentencing whereby he could obtain the benefits of the Youth Corrections Act, including specifically, the opportunity to have

his conviction expunged if he rehabilitates himself, all as provided in 18 U.S.C. §5021.

Furthermore, were Jackson twenty-six years old, and all other surrounding circumstances the same, the Court would have imposed an adult sentence upon him significantly shorter than the 36 to 45 months contemplated by the Youth Correction Act guidelines abovementioned.

The Court rejects the Government's contention on this motion that a young man under the circumstances in which Jackson finds himself, entitled to the benefits of the Youth Corrections Act, must either be placed on probation, which would be unfair to society, or incarcerated pursuant to an indeterminate sentence, under Guidelines which will require him to serve from 36 to 45 months, which would be unfair to the man. Indeterminate sentences are not ideal for every defendant. The uncertainty itself often mitigates against a man's efforts to restructure his own relationship with society. Often a sentence which is too lengthy, in addition to being unjust and unfair, can be counterproductive from the viewpoint of rehabilitation.

As we mentioned in Kavanakcioglu v. United States, _____ F. Supp. _____ decided June 2, 1976 (76 Civ. 910, S.D.N.Y.), it should be a self-evident proposition that now, more than ever before, a

Court requires flexibility in sentencing persons guilty of crime, and in no case is this need greater than in the case of youthful persons. Another indisputable set of principles: penal statutes, including those relating to sentencing are to be strictly construed against the sovereign, and the rule of lenity is to be applied when any ambiguity is present. Justice Frankfurter expressed the point in Bell v. United States, 349 U.S. 81, 83 (1955):

"When Congress leaves to the Judiciary the task of imputing to Congress an undeclared will, the ambiguity should be resolved in favor of lenity.. And this not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct. It may fairly be said to be a presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment."

The effect and purpose of Jackson's sentence is to place him in the status of a Youth Offender, entitled to seek a certificate setting aside his conviction under 18 U.S.C. §5021, but fix his term of confinement at one year in order to evade the U.S. Parole Board Guidelines, which the Court regards as excessive, unjust, unfair and unnecessary in his particular case.

It is preposterous to suggest that the net effect of the indeterminate provisions enacted by Congress in §5010(b), taken together with the Guidelines subsequently imposed by the Executive

Branch of Government, prevent this Court from sentencing a Youthful Offender as such, when his situation is too serious to justify probation under §5010(a), but not serious enough to justify imprisonment for the full period of the guidelines.

Subsection (d) of §5010 is an integral part of the statutory scheme to allow the Court, in its words, to "sentence the youth offender under any other applicable penalty provision." The Court believes that it was not the intent of Congress in so doing to imply that such a sentence was an adult sentence. The Court has the power to treat youthful offenders as adults if the Court is of the opinion that the youth will not benefit from being treated under the Youth Corrections Act, and because of the gravity of his crime, or the extent of his prior record, ought to be sentenced as an adult. If that were the sole purpose of subsection (d) then subsection (d) would be totally superfluous, since no recourse to the optional provisions of the Youth Corrections Act are needed in order to sentence a youth as an adult. We should not construe any statute as containing an intentional superfluity.

The Government's contrary argument lacks common sense. It suggests that Congress required the Court to treat a youth offender not deserving of probation, more severely than an adult offender. It deprives a youth offender so situated from the

valuable opportunity to clear his name and record from a felony conviction incurred in tender years. Such a Draconian result may induce §5010(a) sentences of probation for people who really ought to be confined for a brief period for their own good. A determinate sentence is not per se punitive, it may be rehabilitative. The mere fact of confinement in itself constitutes treatment for some people. And we would expect that the institutionalized setting and work programs in a federal prison are themselves rehabilitative.

After Kayamakcioglu v. United States was decided, Judge Frankel of this Court, whose scholarly interest in the field of sentencing is well-known, rendered an opinion in United States v. Nelson Cruz, 75 Cr. 1150 (S.D.N.Y. July 8, 1976). In addition to expressing the conclusion that "the [determinate] sentence imposed was valid," Judge Frankel held, in language which we endorse, and cannot hope to improve upon, as follows:

"The Youth Corrections Act was 'designed to make available for the discretionary use of the Federal judges a system for the sentencing and treatment of persons under the age of 22 years ... that will promote the rehabilitation of those who in the opinion of the sentencing judge show promise of becoming useful citizens....' H.R.Rep. No. 2979, 81st Cong., 2d Sess. 1 (1950). The major objective was to broaden, not to narrow, the scope of judicial sentencing discretion by providing for individualized rehabilitative treatment for one of the few populations, the young, that may realistically be expected to benefit from it. Id. See also Dorszynski v. United States, 418 U.S. 424, 437 (1974). The Act

was not intended to 'deprive the court of any of its present functions as to sentencing' Views of the Department of Justice reported in S. Rep. No. 1180, 81st Cong. 1st Sess. 10-11 (1949).

It is hard to imagine a sentencing function more basic than the determination of the maximum period of confinement. The Government urges, however, that the Youth Corrections Act must be construed to require the sentencing judge to choose between (1) the power of setting the maximum period of restraint by sentencing a youth as an adult, and thus without the Act's special benefits, and (2) abdicating that ultimate power and committing the youthful offender to the custody of the Attorney General without further instruction. Such a reading is not required by the text of the Act and would do violence to its benevolent purposes.

Section 5010(b), under which the defendant was sentenced, allows the court 'in lieu of the penalty of imprisonment otherwise provided by law, [to] sentence the youth offender to the custody of the Attorney General for treatment and supervision ... until discharged by the Division as provided in section 5017(c)' Section 5017(c) requires the Parole Commission to release an offender sentenced under section 5010(b) 'conditionally ... on or before the expiration of four years from the date of his conviction and ... unconditionally on or before six years from the date of his conviction.' There is nothing magical about the six-year figure; it is merely the outer limit imposed upon the Parole Commission in the absence of more specific instructions from the court. Neither of the cited sections explicitly prohibits the court from committing a youth to the custody of the Attorney General for a maximum term short of six years. Inferring such a prohibition from the equivocal terms of an Act which was said to 'take nothing [in the way of sentencing discretion] away from the court' would pervert the legislative purpose to serve no end other than a drily [sic] harsh literalism. Insofar as the text of the F.Y.C.A. gives color to the position of the Bureau of Prisons

and the Parole Commission, doubts are to be resolved in favor of lenity. See Bell v. United States, 349 U.S. 81, 83 (1955). The Hobson's choice the Government now finds compulsory for the court cannot be deemed to have been intended by a Congress bent upon preserving the existing sentencing powers of the court while adding a new avenue for humane treatment. See Church of the Holy Trinity v. United States, 143 U.S. 457, 459 (1892).

In sum, this court, like others which have confronted similar questions, see Kaymakcioglu v. United States, 76 Civ. 910 (S.D.N.Y. June 2, 1976); United States v. Borawski, 297 F. Supp. 198 (E.D.N.Y. 1969); Satchfield v. United States, 450 F.2d 284, 285 (5th Cir. 1970); Minshew v. United States, 410 F.2d 396, 397 (5th Cir. 1969), concludes that a sentence imposed under 18 U.S.C. §5010(b) may provide for a maximum term of less than six years."

Instructive also is footnote 10 in Judge Frankel's decision in Cruz, supra.

"The data provided to the court by our Chief Probation Officer reveal that 'determinate sentences' imposed under either §5010(b) or (d) of the F.Y.C.A. have typically drawn upon the split-sentence device contained in §3651 of Title 18. The determinate period of confinement is thus usually limited to a maximum of six months, with a period of probation to follow. To be sure, the text of the F.Y.C.A. more easily allows for this type of sentence since it states that nothing in the Act 'shall limit or affect the power of any court to suspend the imposition or execution of any sentence and place a youth offender on probation or be construed in any wise to amend, repeal, or affect [18 U.S.C. §3651]'. 18 U.S.C. §5023(a). But the principle is the same; a determinate sentence of less than six years, as provided for in otherwise applicable sections of Title 18, may be combined with a sentence under the F.Y.C.A. The Act also explicitly empowers the court to impose a determinate sentence of greater than six years, limited only by the maximum adult sentence permitted for the offense involved. 18 U.S.C. §5010(c)."

In addition, there is a long and unquestioned tradition of undisputed judgments, in this District and elsewhere, imposing determinate sentences upon persons adjudged Youthful Offenders, and later executing the Certificate contemplated by §5021. Also, a number of Judges in this District have adjudged that a defendant was a Youthful Offender, and then placed him on probation as an adult under the various options stated in 18 U.S.C. §3651, specifically including the "split sentence." See Cherry v. United States, 299 F.2d 325 (9th Cir. 1962).

The Court holds that the sentence imposed on Jackson was a just and proper sentence, entirely within the statutory powers of this Court, and that he may become entitled to the benefits of the Youth Corrections Act, including the Certificate expunging conviction.

The motion is in all respects denied for want of merit.

So Ordered.

Dated: New York, New York
October 7, 1976

CHARLES L. BRIEANT

CHARLES L. BRIEANT
U. S. D. J.

76-1337

To be argued by
ALLEN R. BENTLEY

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1337

UNITED STATES OF AMERICA,

Appellee,

—v.—

NELSON CRUZ,

Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ALLEN R. BENTLEY,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

TABLE OF CONTENTS

	PAGE
Preliminary Statement	1
Statement of Facts	1
ARGUMENT:	
POINT I—The Original Sentence Imposed on Cruz was Invalid; the Case Should Be Remanded for the Imposition of a Proper Sentence	5
POINT II—If the Sentence Imposed on Cruz was Valid, the Order Denying his Rule 35 Motion Should Be Affirmed	20
CONCLUSION	23

TABLE OF CASES

<i>Bell v. United States</i> , 349 U.S. 81 (1955)	4, 18
<i>Dorszynski v. United States</i> , 418 U.S. 424 (1974)	13, 14, 16
<i>Foote v. United States</i> , 306 F. Supp. 627 (D. Nev. 1969)	21
<i>Hale v. United States</i> , 307 F. Supp. 345 (D. Okla. 1970)	21
<i>In re Bonner</i> , 151 U.S. 242 (1894)	19
<i>Kayamakcioglu v. United States</i> , — F. Supp. —, 76 Civ. 910 (CLB) (S.D.N.Y. June 2, 1976)	15, 17, 18

PAGE

<i>Minshew v. United States</i> , 410 F.2d 396 (5th Cir. 1969)	14, 17, 18
<i>Satchfield v. United States</i> , 450 F.2d 284 (5th Cir. 1970)	14, 17, 18
<i>Staudmier v. United States</i> , 496 F.2d 1191 (10th Cir. 1974)	21
<i>United States v. Borawski</i> , 297 F. Supp. 198 (E.D. N.Y. 1969)	15, 18
<i>United States v. Slutsky</i> , 514 F.2d 1222 (2d Cir. 1975)	21
<i>United States v. Waters</i> , 437 F.2d 722 (D.C. Cir. 1970)	12

OTHER AUTHORITIES

H.R. Rep. No. 2979, 81st Cong., 2d Sess., <i>reprinted in 1950 United States Code Cong. & Adm. News</i> 3983	6, 10
Proceedings of the Committee of the Judicial Conference on the Indeterminate Sentence and Punishment of Crime	8, 9, 11
Report to the Judicial Conference of the Committee on Punishment for Crime (June 1942)	7, 8

**United States Court of Appeals
FOR THE SECOND CIRCUIT**

Docket No. 76-1337

UNITED STATES OF AMERICA,

Appellee,

—v.—

NELSON CRUZ,

Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

Nelson Cruz appeals from an order of the Honorable Marvin E. Frankel, United States District Judge, entered in the United States District Court for the Southern District of New York on July 8, 1976, denying his motion for an order pursuant to Federal Rule of Criminal Procedure 35, reducing his sentence to time served.

Statement of Facts

Indictment 75 Cr. 1150 was filed on November 24, 1975, in three counts. Cruz and codefendants Willie Johnson, Herbert Banks and Charles Rubinstein were charged in Count One with conspiring to steal goods from an interstate shipment in violation of Title 18, United States Code, Sections 371 and 659. Cruz, Johnson and Banks were charged in Count Two with the substantive offense of theft from an interstate shipment in violation of Title 18, United States Code, Sections 659 and 2. Rubinstein was charged in Count Three with receiving goods which had been so stolen in violation of Title 18, United States Code, Section 659.

Cruz entered a plea of guilty to Count One of the indictment on December 23, 1975.* On February 11, 1976, Cruz was sentenced to the custody of the Attorney General for imprisonment for a period of two years, ostensibly as a young adult offender pursuant to Title 18, United States Code, Section 5010(b) as made applicable to him by Title 18, United States Code, Section 4209.** Not long after Cruz' arrival at the Federal Correctional Institution in Petersburg, Virginia, where he is now serving his sentence, he and his attorney were informed that the Bureau of Prisons took the view that a two-year maximum sentence was not permitted under Title 18, United States Code, Section 5010(b), since the Federal Youth Corrections Act, Title 18, United States Code, Sections 5005-5026 ("FYCA"), precludes use of any ceiling other than that established in the Act. Thereafter, an official at Petersburg wrote to the United States Attorney for the Southern District of New York stating the position of the Bureau of Prisons and suggesting that Cruz' sentence be vacated as illegal and that he be resentenced.

On May 20, 1976, Cruz filed a motion pursuant to Federal Rule of Criminal Procedure 35 seeking a reduction of his sentence to time served. In addition to a plea for leniency based on the fact that his wife was pregnant, Cruz asserted as grounds for his Rule 35 motion the fact that the Parole Commission intended, in computing Cruz' release date, to disregard the two-year limitation that the Court had set, on the view that such a limitation in a sentence imposed under Section 5010(b) was not valid. As a result of the Parole Commission's interpretation of the statutes, Cruz could not expect to be released until he had

* Johnson and Banks pleaded guilty to Count Two of the indictment and were sentenced to imprisonment for a period of four years. Rubinstein pleaded guilty to Count Three of the indictment and was sentenced to six months' imprisonment to be followed by fifty-four months probation.

** Section 4209 was recodified as Title 18, United States Code, Section 4216, by Section 3 of the Parole Commission and Reorganization Act, P.L. 94-233, effective May 14, 1976.

served 21 months of his sentence. Affidavit of Benjamin J. Zelermeyer, sworn to May 20, 1976, ¶ 5.

On June 8, 1976, the Assistant United States Attorney assigned to this case wrote the District Court urging that

"Cruz's sentence was not valid under the [Youth Corrections] Act in that Section 5010(b) requires that the sentencing court delegate the release decision to the Board of Parole and precludes the imposition of any maximum sentence short of the maxima embodied in Section 5017(c) of Title 18, U.S.C."

This letter was supplemented by a further letter dated June 25, 1976, in which certain additional authorities bearing on the issue were analysed.

On July 8, 1976, the District Court rendered an opinion holding that "the sentence herein was valid, and . . . should not be reduced." The Court reasoned as follows:

"Section 5010(b), under which the defendant was sentenced, allows the Court 'in lieu of the penalty of imprisonment otherwise provided by law, [to] sentence the youth offender to the custody of the Attorney General for treatment and supervision * * * until discharged by the Division as provided in Section 5017(c) * * *.' Section 5017(c) requires the Parole Commission to release an offender sentenced under Section 5010(b) 'conditionally * * * on or before the expiration of four years from the date of his conviction and * * * unconditionally on or before six years from the date of his conviction.' There is nothing magical about the six-year figure; it is merely the outer limit imposed upon the Parole Commission in the absence of more specific instructions from the Court. Neither of the cited sections explicitly prohibits the Court from committing a youth to the custody

of the Attorney General for a maximum term short of six years. Inferring such a prohibition from the equivocal terms of an Act which was said to 'take nothing [in the way of sentencing discretion] away from the court' would pervert the legislative purpose to serve no end other than a drily harsh literalism. Insofar as the text of the F.Y.C.A. gives color to the position of the Bureau of Prisons and the Parole Commission, doubts are to be resolved in favor of lenity. See *Bell v. United States*, 349 U.S. 81, 83 (1955). The Hobson's choice the Government now finds compulsory for the Court cannot be deemed to have been intended by a Congress bent upon preserving the existing sentencing powers of the Court while adding a new avenue for humane treatment."

The Office of the United States Attorney was directed to report within ten days on what action would be taken by the Bureau of Prisons and the Parole Commission in response to the Court's ruling.

On July 22, 1976, the Assistant assigned to this matter advised the Court that Cruz would not be held in custody or subjected to post-release supervision beyond February 22, 1978. The Court was further advised, however, that the Bureau of Prisons would not award Cruz "good time" because he was not serving a "determinate sentence" within the meaning of Title 18, United States Code, Section 4161, and that the Parole Commission was of the opinion that Cruz, upon his unconditional release, would be ineligible for a certificate vacating his conviction under Title 18, United States Code, Section 5021.

On July 19, 1976, Cruz filed a notice of appeal from the order of the Court dated July 8, 1976. On July 23, 1976, the Court issued a memorandum reporting on the

Government's letter. While Judge Frankel observed that "those who have . . . Cruz incarcerated plan to follow their own rather than the Court's understanding of the judgment," he denied Cruz relief on the ground that Rule 35 was not the appropriate procedure for obtaining compliance with the sentence imposed on February 11, 1976.

ARGUMENT

POINT I

The Original Sentence Imposed on Cruz was Invalid; the Case Should Be Remanded for the Imposition of a Proper Sentence.

Cruz asks this Court to vacate his judgment of conviction and remand for a resentencing. While we agree that the case should be remanded for resentencing, we reach that conclusion for reasons diametrically opposed to those asserted by Cruz, and with a different purpose. Our interpretation of the FYCA is that it gives a Federal sentencing judge the option, in addition to treating an eligible offender as an adult, of sentencing a defendant to a term of probation under Title 18, United States Code, Section 5010(a), or to an *indeterminate* term of treatment and supervision under Title 18, United States Code, Sections 5010(b) or (c). Since Judge Frankel did neither of these, but rather sentenced Cruz to a *determinate* term of two years under Section 5010(b), it follows that the sentence was incorrect and invalid. The case should be remanded for resentencing pursuant to one of the lawful alternatives provided by the statute. The principal focus of this portion of our argument, therefore, is on the legal issue of whether the District Court was empowered to impose a sentence under the FYCA with a "ceiling" shorter than that provided in the Act. We submit that

the legislative history and the plan of the Act both show that the District Court was not so empowered.

A. The History of the Youth Corrections Act shows that it was intended to establish a system of "indeterminate" sentencing.

The legislative history of the Federal Youth Corrections Act demonstrates that its principal innovation was a system of indeterminate sentencing. That history makes it clear that Congress intended to enact a system of indeterminate sentencing, with the decision as to the terms and timing of release resting solely in the Executive Branch. A report of the House Judiciary Committee accompanying the legislation stated:

"Since 1941, a committee of the Judicial Conference of the United States has been studying the general subject of punishment for crime. . . . The study has been extensive and thorough. The committee made a report to the Judicial Conference in 1942 and that report was presented before hearings held the following year in the House of Representatives and the Senate. The legislation under consideration at that time prompted objections because it included what has been termed an 'indeterminate' sentence for adult offenders. Thereafter the conference several times reaffirmed its recommendations dealing with youthful offenders, which were not the focal point of previous objections, and *these recommendations* as approved by the conference in September 1949 *are embodied in the present bill.*" H.R. Rep. No. 2979, 81st Cong., 2d Sess., reprinted in 1950 United States Code Cong. & Adm. News 3983, at 3984 (emphasis added).

The 1942 report to the Judicial Conference by its Committee on Punishment for Crime, referred to in the

House Judiciary Committee report just cited, proposed a system of indeterminate sentencing for all offenders.* The committee described "the indeterminate sentence" as

"an effort to make punishment truly reformatory. Its theory is that one who has been guilty of serious infraction of the criminal laws should be imprisoned for such time as is necessary to cure him of his antisocial tendencies and should then be conditionally released under parole, with adequate supervision, for such time as is necessary to restore him to the normal life of a law-abiding citizen of the community. Since it is impossible to foresee what term of imprisonment and supervision may be necessary to accomplish this result, sentence is not to be for a definite term but for such time as may be necessary to rehabilitate the offender and restore him to his place in society. *Release is to be determined by a board* which will have expert advice and assistance and will give the prisoner an absolute release only when satisfied that a changed social attitude on his part justifies it." Report to the Judicial Conference of the Committee on Punishment for Crime pp. 4-5 (June 1942) (emphasis added).

Title III of the draft legislation that accompanied the Committee Report, *id.*, pp. 14-20, embodying its recommendation for the sentencing of youthful offenders, contained virtually every one of the provisions enacted eight years later as the FYCA. The Committee reported that

* The proposal did not extend to cases in which the sentencing court believed incarceration was unnecessary; in addition, for administrative reasons, cases in which a sentence of one year or less was imposed were excluded from its scope.

"The act gives to the judge power . . . in his discretion, to sentence the youth to the control of the Youth Authority Division of the Board of Corrections for correctional treatment. If this is done, the youth remains in the custody of the Authority for not more than 6 years. *The Authority* may release him conditionally under supervision at any time, and is required so to release him at the end of four years. *Id.* p. 9 (emphasis added).

The deliberations of the Judicial Conference Committee, and particularly the views expressed by its members at its initial meeting on November 8, 1941, make it clear that the notion of a judicially-imposed ceiling on the custodial treatment of a youthful offender was antithetical to the rehabilitative system that was eventually proposed. In the words of Chief Judge Orie L. Phillips, chairman of the subcommittee on youthful offenders:

" . . . if corrective treatment and not deterrent treatment is the answer to the big problem, then I haven't any doubt in my own mind that neither judge nor board can forecast either the minimum or maximum of such treatment, and that that must be worked out by a system that is elastic enough, that ought not be too short and ought not be too long; and therefore it does seem to me that the indeterminate sentence, which gives the elasticity, is a sound basis of sentence under which such treatment will be carried out. I accept the general principle of indeterminate sentence. I think it is sound." Proceedings of the Committee of the Judicial Conference on the Indeterminate Sentence and Punishment of Crime, November 8, 1941, p. 132.

Circuit Judge John C. Collet, a member of the same subcommittee, stated:

"I have this tentative view of the indeterminate sentence proposal, that it is probable that the youth could secure much more from the present law than has been secured, with some cooperative spirit between the courts and the Board of Pardons and Parole . . .

"But the present system cannot be used, in my judgment, to the extent that it will offer a means of accomplishing one of the principle results that the indeterminate sentence law appears to be susceptible to and that is . . . the fixing of the sentence in the light of more careful study and fuller consideration of the individual case." *Id.* 101.

The one committee member who expressed explicit reservations about the indeterminate sentencing proposal at the initial meeting of the Committee, Chief Judge Carroll C. Hincks,* concurred in later Subcommittee and Committee reports recommending its enactment. Nowhere in the history of the FYCA—neither in the transcripts of the November 8, 1941 and February 24, 1942 meetings of the Committee, nor in the June 1942 report of the Committee to the Judicial Conference, nor in the report of the Senate and House Judiciary Committees accompanying S. 2609, the bill which became the FYCA—is there *any* authority for imposition of a fixed ceiling in connection with a Youth Corrections Act sentence.

*"I do not feel wholly satisfied that an administrative body is necessarily essentially better qualified to use the wide discretionary powers involved in sentencing than a judge." *Id.* 105. While this dissenting voice reflects a different view of the wisdom of the legislation ultimately enacted, it conclusively demonstrates that even in Judge Hinck's view it was the agency, and not the sentencing judge, who would determine the time for release under the legislation.

B. A determinate sentence has no place in the structure of the Youth Corrections Act.

Even more significantly, we submit, a reading of the entire Act reveals that the approach taken by Judge Frankel was simply not contemplated. A proper understanding of the role that indeterminate sentencing plays under the Act requires analysis of the "system of analysis, treatment and release," H.R. Rep. No. 2979, 81st Cong., 2d Sess., *reprinted in* 1950 United States Code Cong. & Adm. News 3983, that Congress enacted. Those provisions of the Act dealing with commitment, release and vacatur of the conviction record are critical to this analysis.

Commitment under the Act is governed by Section 5010(b), which provides:

"the Court may, in lieu of the penalty of imprisonment otherwise provided by law, sentence the [young adult offender] to the custody of the Attorney General for treatment and supervision pursuant to this chapter until discharged by the Parole Commission as provided in Section 5017(c) of this chapter. . . ." *

Release of those committed under the Act is governed by Section 5017. That section creates a distinction between conditional release, after which the offender is at liberty under supervision, and unconditional release; it authorizes conditional release "at any time," to be followed by unconditional release as early as one year there-

* A young adult offender may also be committed under Section 5010 (c) in certain cases. See pp. 16-17, *infra*. Sections 6 and 11 of the Parole Commission and Reorganization Act, P.L. 94-233, effective May 14, 1976, amended the FYCA to substitute the Parole Commission for the Division of Youth throughout the Act.

after. For young adult offenders sentenced under Section 5010(b), Section 5017(c) mandates conditional release within four years of commitment, and unconditional release within six years of commitment. In effect, Section 5010(b) effectuates the very consolidation of sentencing authority and responsibility for custodial rehabilitation and post-release supervision that was strongly recommended to the Judicial Conference Committee, *see, e.g.* Tr. of Proceedings on November 8, 1941, pp. 34-35. Section 5010(b) permits the Parole Commission to determine what combination of custody and probation is appropriate in view of the problems of the individual young adult offender; the authority of the Commission ranges from ordering immediate release followed by a year of noncustodial supervision, in effect, imposition of a sentence of one year's probation, to four years of confinement followed by two years of such supervision. The absence of any reference in Section 5017—or, indeed, in *any* part of the statutory scheme or the legislative history—to release pursuant to a judicially-imposed ceiling shows that the permissive language of Section 5010(b) does not authorize discretion to fix a maximum sentence with the framework of the Act.

The view that a determinate sentence is impermissible under the Act is reinforced by reference to Section 5021. That section provides for the issuance of a certificate vacating the conviction record in the case of a young adult offender unconditionally discharged *before* "the expiration of the maximum sentence imposed upon him," 18 U.S.C. § 5021(a) (emphasis added). A determinate sentence such as that imposed on Cruz is seriously inconsistent with the framework of the Act in that it virtually precludes any meaningful post-release supervision in the community and insures that the defendant will not be unconditionally discharged until the expiration of his maximum term. Since an offender released under the term

of a judicially-imposed ceiling is not released "*before* the expiration of the maximum sentence imposed upon him"—indeed, the Commission may be forced to discharge him unconditionally before completion of the year of post-release supervision mandated by Section 5017(b)—he is not entitled to a certificate of vacatur under Section 5021(a).

The three aspects of the Act that set it apart from adult sentencing provisions—an indeterminate sentence, separate confinement for young adult offenders, and ultimate vacatur of the conviction—are integral components of a statutory scheme intended to be applied together or not at all. The authority of the Parole Commission to retain an offender in custody for up to four years is as vital a part of the Act as the separation of young adult offenders from hardened criminals, or the automatic vacatur of the criminal conviction in the case of a young adult offender unconditionally discharged before expiration of his maximum term. It cannot seriously be doubted that a sentence under the FYCA that denied a young adult offender the opportunity to receive treatment at a special institution, or denied an offender the benefits of Section 5021, would be invalid. Cf. *United States v. Waters*, 437 F.2d 722 (D.C. Cir. 1970). Similarly, a determinate two-year maximum sentence is invalid because it ignores one of the most basic objectives of the act—to give the Parole Commission an adequate period of time within which, if found necessary in its discretion, it can seek the rehabilitation of the committed youthful offender. Even though the imposition of a determinate sentence may not result in any shortening of the period of actual confinement—in Cruz's case, for example, it is very likely that he will be conditionally discharged before two years elapse—it significantly shortens the duration of possible post-release supervision, and most importantly, deprives the agency of the "elasticity" the framers of the legislation found necessary.

The interpretation of the FYCA by the Supreme Court in *Dorszynski v. United States*, 418 U.S. 424 (1974), confirms this analysis. In that case, the Court was presented with a question not raised here, that is, whether a District Judge choosing *not* to employ the alternative procedures provided by the FYCA must give his reasons for doing so. In the course of the opinion, however, the Court devoted several pages to a discussion of the purpose, plan and function of the Act. *Id.* at 431-436. In addition to noting that the Act was "an outgrowth" of recommendations made by the Judicial Conference, of which mention has been made, *supra*, the opinion notes that the Act gives sentencing judges "two new alternatives", namely, committing an eligible offender "to the custody of the Attorney General" under Title 18, United States Code, Sections 5010(b) and (c) or placing him on probation under Title 18, United States Code, Section 5010(a). *Id.* at 433 (emphasis added). Absolutely no mention is made of the third alternative invented by Judge Frankel, that is, of allowing the offender the benefits of the Act *with* a predetermined ceiling.

More importantly, subsequent language in the Court's opinion confirms our analysis that the Act was intended to provide a comprehensive plan for the treatment of young offenders, and was not intended simply to provide sentencing judges with a smorgasbord of program elements with which a judge may fashion his own plan. For example, the opinion noted that under a youthful offender sentence "the execution of sentence was to fit the person, not the crime for which he was convicted." *Id.* at 434. Obviously, a tailoring of the "execution" of the sentence to the offender must rely on fitting the time and conditions of release to observation of the offender during confinement—an important procedure that is impossible if a fixed termination date is imposed. The Court further noted, "In addition to institutional treatment, *the Division* was empowered to order conditional release under supervision

at any time. . . ." *Id.* at 434 (emphasis added). Quite clearly, the power to order release was *not* conferred on the District Court. In short, the quoted portions and other language of the opinion make it crystal clear that the Parole Commission was to be conferred sole discretion to determine treatment and release of an offender committed under the Act.*

The sentence imposed by Judge Frankel shortening the period of supervision and otherwise interrupting the plan of the FYCA subverts the very purpose of the Act. His conclusion that he, rather than the Parole Commission, should choose the timing and the period of the supervision constitutes a plain rewriting of the legislative framework. As such, it is incorrect.

C. No persuasive judicial authority supports the District Court's reading of the Youth Corrections Act.

The opinion of the District Court cites three reported judicial opinions—*Satchfield v. United States*, 450 F.2d 284 (5th Cir. 1970); *Minshew v. United States*, 410 F.2d

* While certain language in the *Doszynski* opinion emphasizes that "the Act was meant to enlarge, not restrict, the sentencing options of federal trial courts," see 418 U.S. at 436, it is obvious that this language was not directed to the District Court's discretion in fashioning a sentence under the Act, but simply to the Court's discretion whether or not to employ the alternatives provided by the Act in the first place. This was in direct response to a principal contention raised by the appellant-defendant, that is, that since he was eligible for treatment under the Act he should be so designated as a matter of right. While the Court's opinion concluded that the sentencing court had discretion not to sentence an offender as a youthful offender, it clearly offered no support for Judge Frankel's conclusion that a youthful offender sentence may be coupled with a definite expiration date shorter than the legal maximum.

396 (5th Cir. 1969); and *United States v. Borawski*, 297 F. Supp. 198 (E.D.N.Y. 1969)—and one as yet unreported decision—*Kayamakcioglu v. United States*, — F. Supp. —, 76 Civ. 910 (CLB) (S.D.N.Y., June 2, 1976)—in support of the view that a determinate sentence is valid under the Act. We respectfully submit that none of these cases provides persuasive authority for the sentence imposed herein.

Kayamakcioglu is the most recent of the opinions cited in Judge Frankel's opinion, and the only one purporting to find in the structure of the Act authority to impose a determinate sentence. In *Kayamakcioglu*, the District Court (Brieant, J.) held that a determinate sentence was authorized by Section 5010(d).*

We respectfully urge that *Kayamakcioglu* is wrongly decided in that the language of the Act does not support the conclusion that Section 5010(d) authorizes imposition of a determinate sentence. Indeed, Section 5010(d) merely

* This subsection provides:

"If the court shall find that the youth offender will not derive benefit from treatment under subsection (b) or (c), then the court may sentence the youth offender under any other applicable penalty provision."

Judge Brieant reasoned in part as follows:

"Subsection (d) of § 5010 is an integral part of the statutory scheme to allow the Court . . . to 'sentence the youth offender under any other applicable penalty provision' and believes [sic] that it was not the intent of Congress in so doing to imply that such a sentence was an adult sentence. The Court has the power to treat youthful offenders as adults if the Court is of the opinion that the youth will not benefit from being treated under the Youth Corrections Act, and because of the gravity of his crime, or the extent of his prior record, ought to be sentenced as an adult. If that were the sole purpose as subsection (d) then subsection (d) would be totally superfluous, since no recourse to the optional provisions of the Youth Corrections Act are needed in order to sentence a youth as an adult. We should not construe any statute as containing an intentional superfluity." *Id.* p. 5.

makes it clear that the Act is an optional sentencing device and not a mandatory procedure for all those falling within its age limits, as the Supreme Court held in *Dorszynski v. United States*, *supra*. No superfluity results from reading Section 5010(d) solely as authorizing sentencing as an adult, under the general penalty provisions and entirely outside of the Act.*

Moreover, even assuming that the optional nature of the Act is apparent in other provisions than Section 5010(d), that section would still not be superfluous because it substantially qualifies the discretion arguably granted to the court by Section 5010(b) since as it requires, as a precondition of resort to any other applicable sentence, a finding that the youthful offender will not derive benefit from custodial treatment under the Act. See *Dorszynski v. United States*, *supra*.

Rather, to read Section 5010(d) as authorizing imposition of a determinate ceiling under the Act is to render superfluous the section that immediately precedes it. Section 5010(c) expressly permits sentences under the Act of more than the maximum of six years permitted under Sections 5010(b) and 5017; it authorizes the Court to fix a maximum term not in excess of the statutory maximum established by law for adults convicted of the offense

* In view of the ambiguity of the remainder of the Act on this point, Section 5010(d) was needed to insure that the Act would not be mechanically employed, resulting in the automatic sentencing to treatment under the Act of even the most hardened young defendants. Other than Section 5010(d), only Sections 5010(a), (b), and (c) can be read as reflecting the optional nature of the Act. The permissive language employed in these sections might be construed as giving a sentencing court discretion only as to which of the three specific sentencing options *within* the Act should be invoked, and such a construction would be at least as plausible as the interpretation that Congress, by using the word "may," meant to preserve the court's authority to sentence those aged 18 to 22 as adults in proper cases.

involved. If the sentencing court were authorized by Section 5010(d) to sentence a defendant "under the Act" to any term of incarceration authorized by the statute he had violated, Section 5010(c) would serve no purpose. Reading Section 5010(d) to avoid the untenable conclusion that Section 5010(c) is superfluous is, we submit, more reasonable than finding in that section authority for imposing a determinate sentence which creates a ceiling on incarceration short of that established by the Act.*

Unlike *Kayamakcioglu*, both *Satchfield* and *Minsheu* considered the question of whether a sentence under the Act, carrying the possibility of incarceration for as long as six years, could be imposed on a defendant who had not been advised of it prior to a plea of guilty. The cases held merely that sentencing to indeterminate confinement under the Act was invalid under such circumstances and as a practical remedy reduced the limit on the time which could be served to five years, the statutory maximum for adults for the offenses involved. No such due process considerations were applicable when Cruz was sentenced; the record reflects that he was fully advised that one of the possible consequences of his plea was imposition of a sentence under the Act.** Nothing

* Since the decision in *Kayamakcioglu v. United States*, Judge Brieant has reaffirmed his opinion in a memorandum relying on *Kayamakcioglu* and on Judge Frankel's opinion in this case. *United States v. Jackson*, 76 Cr. 247 (S.D.N.Y., October 7, 1976). It is worth noting, however, that while Judge Frankel agreed with the result reached in *Kayamakcioglu*, he chose to justify his sentencing of Cruz by reference to §5010(b) rather than §5010(d).

** Judge Frankel advised Cruz on December 23, 1975 that "at your age you could be sentenced as a young adult offender and that means that if you were sentenced in that way you could conceivably go away for up to six years." He further explained the FYCA as follows: "Well, as a young adult offender you can be sentenced under a special law that says you can be held in prison, special prison for young people for up to four years and then you are let out and then if you misbehave you can go back for another two years." Tr. of Dec. 23, 1975, pp. 4-5.

in either *Satchfield* or *Minshew* can be read as endorsing plenary power in the sentencing judge to decide that the maxima under the Act were excessive in a particular case.

In *United States v. Borawski*, 297 F. Supp. 198 (E.D.N.Y. 1969), a District Court imposed a "split sentence" of 6 months' incarceration to be followed by 30 months' probation, relying on Section 5010(a). The Court noted that "[s]trictly interpreted, this section [5010(a)] may be inapplicable here," 297 F. Supp. 199, but justified the sentence by stating that the purpose of citing the Act was "to confer a benefit on the defendant," 297 F. Supp. 200, namely, vacatur of the conviction record pursuant to Section 5021. *Borawski*, we submit, erroneously invades the discretion over the release decision vested by law with the Parole Commission.

In sum, the argument that a determinate sentence may be imposed under the Act is unsupported by any cohesive reading of the statute, is inconsistent with the Act's purposes, and has not been shown by any reasoned judicial precedent to be authorized by law. Furthermore, in imposing a youthful offender sentence with such a "ceiling," the District Court is simply not "resolving ambiguity in favor of lenity," as both the District Court in this case and the *Kayamackioglu* court contended, citing *Bell v. United States*, 349 U.S. 81, 83 (1955). The statute is absolutely unambiguous, providing for three specific alternatives within the framework of the Act and for the further option of treating the offender as an adult. Moreover, a sentencing as a young adult offender with a judicially-imposed ceiling is simply not a benefit of which the defendant would be, under our reading of the statute, unfairly deprived. Rather, such a sentence is a judicially-contrived amalgam of other sentence alternatives provided by the Act, which

is less severe than an indeterminate sentence in that it protects the defendant against lengthy probation and the possibility of re-incarceration for its violation, but is more severe in terms of the consequences which flow from its application in the overall context of the Act.*

The sentence imposed was simply incorrect and unauthorized. The Supreme Court in *In re Bonner*, 151 U.S. 242, 256 (1894), offered this wise caution against such judicial legislation:

"[I]n all cases where life or liberty is affected by its proceedings, the court must keep strictly within the limits of the law authorizing it to take jurisdiction and to try the case and to render judgment. It cannot pass beyond those limits in any essential requirement in either stage of these proceedings; and its authority in those particulars is not to be enlarged by any mere inferences from the law or doubtful construction of its terms."

It follows that the judgment of the District Court should be vacated, and the case remanded for resentencing, as the appellant requests, with the order, however, that the sentence consist either of a term of years imposed pursuant to the general sentencing provisions applicable to adults, as authorized by Section 5010(d), or that Cruz be to be sentenced under one of the specific provisions of the Youth Corrections Act.

* By imposing a two-year "ceiling," Judge Frankel has deprived Cruz of one of the most valued benefits of the FYCA, that is, eventual vacatur of his conviction. When Cruz is unconditionally discharged on February 22, 1978, as required by Judge Frankel, he will not have been so discharged "before the expiration of the maximum sentence imposed on him"; indeed, in all likelihood he will not then have been subject to even the one year of post-conditional release supervision which Congress thought minimally necessary. See Title 18, United States Code, Sections 5017 (b) and 5021 (a). To suggest, as Cruz does, that he will then be eligible for a Section 5021(a) certificate is to call for abrogation of the statute by judicial fiat.

POINT II

If the Sentence Imposed on Cruz was Valid, the Order Denying his Rule 35 Motion Should Be Affirmed.

We respectfully urge, for reasons set forth in Point I, *supra*, that Cruz' motion should have been granted to the extent of vacating the sentence imposed on him as illegal and setting this matter down for resentencing in compliance with the applicable sentencing provisions. If, however, this Court should find that a two-year determinate sentence can properly be combined with provisions of the Youth Corrections Act, or that the Government's objection to the sentence was untimely,* the denial of Cruz' Rule 35 motion should be affirmed.

As we read the Parole Board Guidelines in effect at the time of Cruz' initial parole consideration, whether Cruz was sentenced to an indeterminate term under the Act or to a two-year sentence as an adult had no effect on his eligibility for release on parole, since the maximum sentence imposed by the Court operates only to require release when such sentence is shorter than the period indicated by the Guidelines. As pointed out in Point I, *supra*, since Cruz is slated for probable release after serving less than 24 months, the major impact of imposing a two-year maximum in lieu of an indeterminate term is to shorten the period of post-release supervision from a maximum of 51 months to 3 months. Cruz' complaint that his sentence is not being carried out as intended is thus limited to two points—the stated intentions of the Bureau of Prisons to deny him good time, and of the

* We note, however, that the minutes of Cruz' sentencing reflect Judge Frankel's awareness of the Parole Commission's "preference" for an indeterminate sentence. It was only after defense counsel declined to say whether Cruz "would want a specifically prescribed sentence or under the youth provisions, or whether you want him just committed for the indeterminate term," Tr. of Feb. 11, 1976 pp. 11-12, that Judge Frankel created the composite sentence at issue on this appeal. In addition, Rule 35 provides that an illegal sentence may be corrected at any time.

Parole Commission to deny him a Section 5021 certificate—neither of which is yet ripe for adjudication.

The District Court properly held that neither of these issues could be litigated by use of Rule 35. With respect to the question of when Cruz will be released, the Court noted that "There is no reason to erase almost all of the sentence the court intended to impose"; this conclusion was particularly apt since crediting Cruz with the "good time" that he seeks would result in advancing his presently-projected release date by at most two months. While the cases and Title 18, United States Code, Section 4161 itself appear to establish that "good time" is not available to those serving indeterminate FYCA sentences, *Staudmier v. United States*, 496 F.2d 1191 (10th Cir. 1974); *Hale v. United States*, 307 F. Supp. 345 (D. Okla. 1970), the issue of whether one incarcerated pursuant to a definite sentence "under the Act" is precluded from earning "good time" by Title 18, United States Code, Section 5017(e), see *Foote v. United States*, 306 F. Supp. 627 (D. Nev. 1969), could simply and effectively be litigated in a motion filed pursuant to 28 U.S.C. § 2241, at such time as Cruz would be entitled to release were the good time credited.

Similarly, on any theory Cruz will not be eligible for a Section 5021 certificate until he is unconditionally discharged at the expiration of his sentence. If he is denied the certificate at that time, he will be at liberty to vindicate his rights through the mechanism of a mandamus action against the Parole Commission.*

The prematurity of Cruz' claims and the availability of effective remedies to protect his rights clearly distinguish this case from *United States v. Slutsky*, 514 F.2d 1222

* Moreover, we fail to see any means other than vacating its sentence and imposing a lawful one, as we have urged, by which the District Court, by "reducing" Cruz' sentence, could have eased Cruz' present uncertainty as to his potential eligibility for the statutory certificate at issue.

(2d Cir. 1975), upon which Cruz principally relies. Cruz ignores the fact that in *Slutsky* the Parole Board was acting entirely within its discretion, although in a manner this Court found illogical. Thus, the defendants had no recourse to correct what had undeniably been a mistaken impression concerning the procedures of the Parole Board other than to seek reduction of their sentences. Furthermore, the Slutskys' initial application to the District Court was treated summarily, in direct contrast to the thorough consideration given by Judge Frankel. In this case, by contrast, if this Court finds Cruz' original sentence to have been valid, Cruz will be unconditionally discharged no later than two years from the date he surrendered to begin serving his sentence. As to such ancillary issues as "good time" and the vacatur certificate, denial of which Judge Frankel implied would violate his understanding of the judgment, Cruz has ample other remedies at his disposal that are directed to the proper parties.

Treatment of Cruz' claim in this fashion has another advantage as well: if the Court disagrees with what we submit is the only view of the FYCA based on the legislation itself and on its history, the problem will be one of greater dimensions than this case itself, since it is apparent that others may be in a situation similar to that of Cruz. To handle such situations in the *ad hoc* fashion of forcing district judges individually to exercise their discretion under Rule 35 is, we submit, an illogical approach that will only breed confusion. The far better solution is for this Court to declare Cruz' sentence valid or invalid and to allow Cruz to litigate the consequences of the sentence, if it is found valid, directly with the agencies charged with administering it. With this much of Judge Frankel's opinion we agree. Thus, if this Court disagrees with our analysis in Point I, in the alternative the order of the District Court should be affirmed.

CONCLUSION

The order of the District Court should be vacated, and the case remanded for resentencing as an adult or under one of the specific provisions of the Youth Corrections Act; in the alternative, the order of the District Court should be affirmed.

Respectfully submitted,

ROBERT B. FISKE, JR.,
*United States Attorney for the
Southern District of New York,
Attorney for the United States
of America.*

ALLEN R. BENTLEY,
FREDERICK T. DAVIS,
*Assistant United States Attorneys,
Of Counsel.*

Rec'd 2 Copies

12/9/76

Legal Aid Society

M. Piazza